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Act, section 201, Pub. L. 95–91 (42 U.S.C. 7131).

(d) *Employee* means—

(1) An employee as defined by 5 U.S.C. 2105;

(2) A special Government employee as defined in 18 U.S.C. 202(a);

(3) A member of a Uniformed Service.

(e) *Handicapped individual* means a person who has a physical or mental disability or health impairment, and includes an individual who is temporarily incapacitated because of illness or injury.

(f) *Principal departmental officer* means the Secretary, Deputy Secretary, or Under Secretary, or, in the case of the Federal Energy Regulatory

Commission, the Chairman or Executive Director of the Commission.

(g) *Relative* means, with respect to a DOE employee, an individual who is related to the employee, by blood, marriage, or operation of law, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandchild, grandparent, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, and shall also include the grandparent of an employee's spouse, an employee's fiancé or fiancée, or any person residing in the employee's household.

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PART 1703—PUBLIC INFORMATION AND REQUESTS

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AUTHORITY: 5 U.S.C. 552; Executive Order 12600, 3 CFR, 1987 Comp., p. 235; 42 U.S.C. 2286, 2286b(c).

SOURCE: 56 FR 21261, May 8, 1991, unless otherwise noted.

§ 1703.101 Scope.

This part contains the Board's regulations implementing the Freedom of Information Act, 5 U.S.C. 552.

§ 1703.102 Definitions; words denoting number, gender and tense.

Agency record is a record in the possession and control of the Board that is associated with Board business. Agency records do not include records such as:

(1) Publicly available books, periodicals, or other publications that are owned or copyrighted by non-federal sources;

(2) Records solely in the possession and control of Board contractors;

(3) Personal records in the possession of Board personnel that have not been circulated, were not required by the Board to be created or retained, and may be retained or discarded at the author's sole discretion. In determining whether such records are agency records the Board shall consider whether, and to what extent, the records were used in agency business;

(4) Records of a personal nature that are not associated with any Board business; or

(5) Non-substantive information in the calendar or schedule books of the Chairman or Members, uncirculated except for typing or recording purposes.

Board means the Defense Nuclear Facilities Safety Board.

Chairman means the Chairman of the Board.

Designated FOIA Officer means the person designated by the Board to administer the Board's activities pursuant to the regulations in this part. The Designated FOIA Officer shall also be the Board officer having custody of or responsibility for agency records in the possession of the Board and shall be the Board officer responsible for authorizing or denying production of records upon requests filed pursuant to § 1703.105.

General Counsel means the chief legal officer of the Board.

General Manager means the chief administrative officer of the Board.

Member means a Member of the Board.

In determining the meaning of any provision of this part, unless the context indicates otherwise: the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

§ 1703.103 Requests for board records available through the public reading room.

(a) A Public Reading Room will be maintained at the Board's headquarters and will be open between 8:30 a.m. and 4:30 p.m. Mondays through Fridays, with the exception of legal holidays. Documents may be obtained in person or by written or telephonic request from the Public Reading Room by reasonably describing the records sought. The purpose of the Public Reading Room is to provide easy accessibility to a substantial portion of the Board's records. The Board considers that documents available through the Public Reading Room have been placed in the public domain.

(b) The public records of the Board that are available for inspection and copying upon request in the Public Reading Room include:

(1) The Board's rules and regulations;

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(2) Statements of policy adopted by the Board.

(3) Board recommendations; the Secretary of Energy's response, any final decision, and implementation plans regarding Board recommendations; and interested person's comments, data, views, or arguments to the Board concerning its recommendations and the Secretary of Energy's response and final decision;

(4) Transcripts of public hearings and any Board correspondence related thereto;

(5) Recordings or transcripts of Board meetings that were closed under 10 CFR part 1704, where the Board subsequently determines under 10 CFR 1704.9 that the recordings or transcripts may be made publicly available;

(6) Board orders, decisions, notices, and other actions in a public hearing;

(7) Board correspondence, except that which is exempt from mandatory public disclosure under § 1703.104;

(8) Copies of the filings, certifications, pleadings, records, briefs, orders, judgments, decrees, and mandates in court proceedings to which the Board is a party and the correspondence with the courts or clerks of court;

(9) Those of the Board's Administrative Directives that affect members of the public;

(10) Index of the documents identified in this section, but not including drafts thereof; and

(11) Annual reports to Congress in which the Board's operations during a past fiscal year are described.

(12) Copies of records released pursuant to FOIA requests, along with an index to these records. The format will generally be the same as the format of the released records.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66815, Dec. 22, 1997]

§ 1703.104 Board records exempt from public disclosure.

The following records are exempt from public disclosure:

(a)(1) Records specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and

(2) Which are in fact properly classified pursuant to such Executive Order;

(b) Records related solely to the internal personnel rules and practices of an agency;

(c) Records specifically exempted from disclosure by statute, provided that such statute:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Interagency or intraagency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Board;

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(g) Records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(1) Could reasonably be expected to interfere with enforcement proceedings,

(2) Would deprive a person of a right to a fair trial or an impartial adjudication,

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(4) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such

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disclosure could reasonably be expected to risk circumvention of the law, or

(6) Could reasonably be expected to endanger the life or physical safety of any individual;

§ 1703.105 Requests for board records not available through the public reading room (FOIA requests).

(a) Upon the request of any person, the Board shall make available for public inspection and copying any reasonably described agency record in the possession and control of the Board, but not available through the Public Reading Room, subject to the provisions of this part. If a member of the public files a request with the Board under the FOIA for records that the Board determines are available through the Public Reading Room, the Board will treat the request under the simplified procedures of § 1703.103.

(b)(1) A person may request access to Board records that are not available through the Public Reading Room by using the following procedures:

(i) The request must be in writing and must describe the records requested to enable Board personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any Board personnel who have been contacted regarding the request prior to the submission of the written request.

(ii) A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described. The request must enable the Board to identify and locate the records by a process that is not unreasonably burdensome or disruptive of Board operations.

(2) The request should be addressed to the Designated FOIA Officer and clearly marked "Freedom of Information Act Request." The address for such requests is: Designated FOIA Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. For purposes

of calculating the time for response to the request under § 1703.108, the request shall not be deemed to have been received until it is in the possession of the Designated FOIA Officer or his designee.

(3) The request must include:

(i) A statement by the requester of a willingness to pay the fee applicable under § 1703.107(b), or to pay that fee not to exceed a specific amount, or

(ii) A request for waiver or reduction of fees.

(4) No request shall be deemed to have been received until the Board has:

(i) Received a statement of willingness to pay, as indicated in § 1703.105(b)(3)(i), or

(ii) Received and approved a request for waiver or reduction of fees. However, the FOIA request shall be deemed to have been received if the request for waiver or reduction of fees includes a statement of willingness to pay the fee anticipated to be incurred in processing the request under this section, or to pay that fee not to exceed a specific amount, should the request for fee waiver or reduction be denied.

(c) with respect to records in the files of the Board that have been obtained from other federal agencies:

(1) Where the record originated in another federal agency, the Designated FOIA Officer shall refer the request to that agency and so inform the requester, unless the originating agency agrees to direct release by the Board.

(2) Requests for Board records containing information received from another agency, or records prepared jointly by the Board and other agencies, shall be treated as requests for Board records. The Designated FOIA Officer shall, however, coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, shall cite the other agency Denying Official as well as the Designated FOIA Officer if a denial by the Board is also involved.

(d) If a request does not reasonably describe the records sought, as provided in paragraph (b) of this section, the Board response shall specify the reasons why the request failed to meet those requirements and shall offer the

requester the opportunity to confer with knowledgeable Board personnel in an attempt to restate the request. If additional information is needed from the requester to render records reasonably described, any restated request submitted by the requester shall be treated as an initial request for purposes of calculating the time for response under §1703.108.

(e)(1) *Expedited processing.* A person may request expedited processing of an FOIA request when a compelling need for the requested records has been shown. “Compelling need” means:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if the request is made by a person primarily engaged in disseminating information; or

(iii) The records pertain to an immediate source of risk to the public health and safety or worker safety at a defense nuclear facility under the Board’s jurisdiction.

(2) A requester seeking expedited processing should so indicate in the initial request, and should state all facts supporting the need to obtain the requested records rapidly. The requester must also state that these facts are true and correct to the best of the requester’s knowledge and belief.

(3) When a request for expedited processing is received, the Board will respond within ten calendar days from the date of receipt of the request, stating whether or not the request has been granted. If the request for expedited processing is denied, any appeal of that decision will be acted upon expeditiously.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66815, Dec. 22, 1997]

§ 1703.106 Requests for waiver or reduction of fees.

(a) The Board shall collect fees for record requests made under §1703.105, as provided in §1703.107(b), unless a requester submits a request in writing for a waiver or reduction of fees. The Designated FOIA Officer shall make a determination on a fee waiver or reduc-

tion request within five working days of the request coming into his possession. No determination shall be made that a fee waiver or reduction request should be denied, until the Designated FOIA Officer has consulted with the General Counsel’s Office. If the determination is made that the written request for a waiver or reduction of fees does not meet the requirements of this section, the Designated FOIA Officer shall inform the requester that the request for waiver or reduction of fees is being denied and set forth his appeal rights under §1703.109.

(b) A person requesting the board to waive or reduce search, review, or duplication fees shall:

(1) Describe the purpose for which the requester intends to use the requested information;

(2) Explain the extent to which the requester will extract and analyze the substantive content of the agency record;

(3) Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications the requester possesses to utilize information for the intended use in such a way that it will contribute to public understanding;

(4) Describe the likely impact of disclosure of the requested records on the public’s understanding of the subject as compared to the level of understanding of the subject existing prior to disclosure;

(5) Describe the size and nature of the public to whose understanding a contribution will be made;

(6) Describe the intended means of dissemination to the general public;

(7) Indicate if public access to information will be provided free of charge or provided for an access or publication fee; and

(8) Describe any commercial or private interest the requester or any other party has in the agency records sought.

(c) The Board shall waive or reduce fees, without further specific information from the requester if, from information provided with the request for agency records made under §1703.105, it can determine that disclosure of the information in the agency records is in the public interest because it is likely

to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(d) In making a determination regarding a request for a waiver or reduction of fees, the Board shall consider the following factors:

(1) Whether the subject of the requested agency records concerns the operations or activities of the Government;

(2) Whether disclosure of the information is likely to contribute significantly to public understanding of Government operations or activities;

(3) Whether, and the extent to which, the requester has a commercial interest that would be furthered by the disclosure of the requested agency records; and

(4) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

§ 1703.107 Fees for record requests.

(a) Fees for records available through the Public Reading Room.

(1) With the exception of copies of transcripts of Board public hearings addressed in paragraph (a)(2) of this section, the fees charged shall be limited to costs of duplication of the requested records. The Board shall either duplicate the requested records or have them duplicated by a commercial contractor. If the Board duplicates the records, it shall not charge the requester for the associated labor costs. A schedule of fees for this duplication service shall be prescribed in accordance with paragraph (b)(6) of this section. A person may obtain a copy of the schedule of fees in person or by mail from the Public Reading Room. There shall be no charge for responses consisting of ten or fewer pages.

(2) Transcripts of Board public hearings are made by private contractors. Interested persons may obtain copies of public hearing transcripts from the contractor at prices set in the contract, or through the duplication service noted in paragraph (a) of this section,

if the particular contract so permits. Copies of the contracts shall be available for public inspection in the Public Reading Room.

(3) Requests for certification of copies of official Board records must be accompanied by a fee of \$5.00 per document. Inquiries and orders may be made to the Public Reading Room in person or by mail.

(b) Fees for records not available through the Public Reading Room (FOIA requests).

(1) *Definitions.* For the purpose of paragraph (b) of this section:

Commercial use request means a request from or on behalf of one who seeks information for a use or purpose that furthers commercial, trade, or profit interests as these phrases are commonly known or have been interpreted by the courts in the context of the FOIA;

Direct costs means those expenditures which the Board incurs in search, review and duplication, as applicable to different categories of requesters, to respond to requests under § 1703.105. Direct costs include, for example, the average hourly salary and projected benefits costs of Board employees applied to time spent in responding to the request and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as cost of space, and heating or lighting the facility in which the Board records are stored.

Educational institution refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program of scholarly research;

Noncommercial scientific institution refers to an institution that is not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry;

Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to

the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when the periodicals can qualify as disseminations of “news”) who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media may be included in this category. A “freelance” journalist may be regarded as working for a news organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the news organization. A publication contract would be the clearest proof, but the Board may also look to the past publication record of a requester in making this determination.

(2) *Fees.* (i) If documents are requested for commercial use, the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time and for document review time, and the costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section.

(ii) If documents are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media, the Board’s charges shall be limited to the direct costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for the first 100 pages of duplication.

(iii) For a request not described in paragraphs (b)(2) (i) or (ii) of this section the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time, and the direct costs of duplication as

established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for document review time and the first 100 pages of reproduction and the first two hours of search time will be furnished without charge.

(iv) [Reserved]

(v) The Board, or its designee, may establish minimum fees below which no charges will be collected, if it determines that the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fees. If total fees determined by the Board for a FOIA request would be less than the appropriate threshold, the Board shall not charge the requesters.

(vi) Payment of fees must be by check or money order made payable to the U.S. Treasury.

(vii) Requesters may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Board reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading assessment of fees, the Board may aggregate any such requests and charge the requester accordingly. The Board shall not, however, aggregate multiple requests on unrelated subjects from a requester.

(viii) Whenever the Board estimates that duplication or search costs are likely to exceed \$25, it shall notify the requester of the estimated costs, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester an opportunity to confer with the Board personnel with the object of reformulating the request to meet the requester’s needs at a lower cost.

(3) *Fees for unsuccessful search.* The Board may assess charges for time spent searching, even if it fails to locate the records, or if records located are determined to be exempt from disclosure.

(4) *Advance payments.* (i) If the Board estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250, the Board shall notify such requester

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of the estimated cost and either require satisfactory assurance of full payment where the requester has a history of prompt payment of fees, or require advance payment of the charges if a requester has no payment history.

(ii) If a requester has previously failed to pay a fee charged in a timely fashion, the Board shall require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Board will begin to process a new request or a pending request from that requester.

(iii) When the Board requires advance payment under this paragraph, the administrative time limits prescribed in §1703.108(b) will begin only after the Board has received the fee payments.

(5) *Debt collection.* The Board itself may endeavor to collect unpaid FOIA fees, or may refer unpaid FOIA invoices to the General Services Administration, or other federal agency performing financial management services for the Board, for collection.

(6) *Annual adjustment of fees.*—(i) *Update and publication.* The Board, by its designee, the General Manager, shall promulgate a schedule of fees and the average hourly pay rates and average hourly projected benefits cost and will update that schedule once every twelve months. The General Manager shall publish the schedule for public comment in the FEDERAL REGISTER.

(ii) *Payment of updated fees.* The fee applicable to a particular FOIA request will be the fee in effect on the date that the request is received.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66816, Dec. 22, 1997]

§ 1703.108 Processing of FOIA requests.

(a) Where a request complies with §1703.105 as to specificity and statement of willingness to pay or request for fee waiver or reduction, the Designated FOIA Officer shall acknowledge receipt of the request and commence processing of the request. The Designated FOIA Officer shall prepare a written response:

- (1) Granting the request,
- (2) Denying the request,
- (3) Granting or denying it in part,

(4) Stating that the request has been referred to another agency under §1703.105, or

(5) Informing the requester that responsive records cannot be located or do not exist.

(b) Action pursuant to this section to provide access to requested records shall be taken within twenty working days. This time period may be extended up to ten additional working days, in unusual circumstances, by written notice to the requester. If the Board will be unable to satisfy the request in this additional period of time, the requester will be so notified and given the opportunity to—

(1) Limit the scope of the request so that it can be processed within the time limit, or

(2) Arrange with the Designated FOIA Officer an alternative time frame for processing the original request or a modified request.

(c) For purposes of this section and §1703.109, the term *unusual circumstances* may include but is not limited to the following:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the Board's Washington, DC offices;

(2) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which may be responsive to a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency pursuant to §1703.105(d).

(d) If no determination has been made at the end of the ten day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the Board will nevertheless continue to process the request. If the Board is unable to provide a response within the statutory period, the Designated FOIA Officer shall inform the requester of the reason for the delay; the date on which a determination may be expected to be

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made; and that the requester can seek remedy through the courts, but shall ask the requester to forgo such action until a determination is made.

(e) Nothing in this part shall preclude the Designated FOIA Officer and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement shall be confirmed in writing and shall clearly specify the total time agreed upon.

(f) The procedure for appeal of denial of a request for Board records is set forth in § 1703.109.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66816, Dec. 22, 1997]

§ 1703.109 Procedure for appeal of denial of requests for board records and denial of requests for fee waiver or reduction.

(a)(1) A person whose request for access to records or request for fee waiver or reduction is denied in whole or in part may appeal that determination to the General Counsel within 30 days of the determination. Appeals filed pursuant to this section must be in writing, directed to the General Counsel at the address indicated in § 1703.105(b)(2) and clearly marked "Freedom of Information Act Appeal." Such an appeal received by the Board not addressed and marked as indicated in this paragraph will be so addressed and marked by Board personnel as soon as it is properly identified and then will be forwarded to the General Counsel. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the General Counsel.

(2) The General Counsel shall make a determination with respect to any appeal within 20 working days after the receipt of such appeal. If, on appeal, the denial of the request for records or fee reduction is in whole or in part upheld, the General Counsel shall notify the person making such request of the provisions for judicial review of that determination.

(b) In unusual circumstances, as defined in § 1703.108(c), the time limits prescribed for deciding an appeal pursuant to this section may be extended by up to ten working days, by the General Counsel, who will send written notice to the requester setting forth the

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reasons for such extension and the expected determination date.

§ 1703.110 Requests for classified records.

The Board may at any time be in possession of classified records and Unclassified Controlled Nuclear Information (UCNI) received from the Department of Energy or other federal agencies. The Board shall refer requests under § 1703.105 for such records or information to the Department of Energy or other originating agency without making an independent determination as to the releasability of such documents. The Board shall refer requests for classified records in a manner consistent with Executive Order 12356, "National Security Information," 3 CFR, 1982 Comp., p. 166, or any superseding Executive Order. The Board shall refer requests for UCNI in a manner consistent with 42 U.S.C. 2168 and the Department of Energy's implementing regulations in 10 CFR part 1017 or any successor regulations.

§ 1703.111 Requests for privileged treatment of documents submitted to the board.

(a) *Scope.* Any person submitting a document to the Board may request privileged treatment by claiming that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of FOIA and should otherwise be withheld from public disclosure.

(b) *Procedures.* A person claiming that information is privileged under paragraph (a) of this section must file:

(1) An application, accompanied by an affidavit, requesting privileged treatment for some or all of the information in a document, and stating the justification for nondisclosure of the information and addressing the factors set forth in paragraph (e) of this section;

(2) The original document, boldly indicating on the front page "Contains Privileged Information—Do Not Release" and identifying within the document the information for which the privileged treatment is sought;

(3) Three copies of the redacted document (*i.e.*, without the information for

which privileged treatment is sought) and with a statement indicating that information has been removed for privileged treatment; and

(4) The name, title, address, telephone number, and telecopy information of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Board.

(c) *Effect of privilege claim.* (1) The Designated FOIA Officer shall place documents for which privileged treatment is sought in accordance with paragraph (b) of this section in a nonpublic file, while the request for confidential treatment is pending. By placing documents in a nonpublic file, the Board is not making a determination on any claim for privilege. The Board retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its responsibilities.

(2) The Designated FOIA Officer shall place the request for privileged treatment described in paragraph (b)(1) of this section and a copy of the redacted document described in paragraph (b)(3) of this section in a public file while the request for privileged treatment is pending.

(d) *Notification of request and opportunity to comment.* When a FOIA requester seeks a document for which privilege is claimed, the Designated FOIA Officer shall so notify the person who submitted the document and give that person an opportunity (at least five days) in which to comment in writing on the request. A copy of this notice shall be sent to the FOIA requester.

(e) *Factors to be considered by Board.* In determining whether to grant the document privileged status and to deny the request for the document the Board shall consider:

(1) Whether the information has been held in confidence by its owner;

(2) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

(3) Whether the information was transmitted to and received by the Board in confidence;

(4) Whether the information is available in public sources; and

(5) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(f) *Notification before release.* Notice of a decision by the Designated FOIA Officer to deny a claim of privilege, in whole or in part, shall be given to any person claiming that information is privileged no less than five days before public disclosure. The decision shall be made only after consultation with the General Counsel's Office. The notice shall briefly explain why the person's objections to disclosure were not sustained. A copy of this notice shall be sent to the FOIA requester.

(g) *Notification of suit in Federal courts.* When a FOIA requester brings suit to compel disclosure of confidential commercial information, the Board shall notify the person who submitted documents containing such confidential commercial information of the suit.

§ 1703.112 Computation of time.

In computing any period of time under this part, the day of the Board's action is not included. The last day of the period is included unless it is a Saturday, Sunday or legal holiday, in which case the period runs until the end of the next working day. Whenever a person has the right or is required to take some action within a prescribed period after notification by the Board and the notification is made by mail, five days shall be added to the prescribed period. Only two days shall be added when a notification is made by express mail.

PART 1704—RULES IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT

Sec.
1704.1 Applicability.

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- 1704.2 Definitions.
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- 1704.9 Availability and retention of transcripts, recordings, and minutes, and applicable fees.
- 1704.10 Severability.

AUTHORITY: 5 U.S.C. 552b; 42 U.S.C. 2286, 2286b(c).

SOURCE: 56 FR 9609, Mar. 7, 1991, unless otherwise noted.

§ 1704.1 Applicability.

(a) This part implements the provisions of the Government in the Sunshine Act (5 U.S.C. 552b). These procedures apply to meetings, as defined herein, of the Members of the Defense Nuclear Facilities Safety Board (Board). The Board may waive the provisions set forth in this part to the extent authorized by law.

(b) Requests for all documents other than the transcripts, recordings, and minutes described in §1704.8 shall be governed by Board regulations pursuant to the Freedom of Information Act (5 U.S.C. 552).

§ 1704.2 Definitions.

As used in this part:

(a) *Chairman* and *Vice Chairman* mean those Members designated by the President to serve in said positions, pursuant to 42 U.S.C. 2286(c).

(b) *Defense Nuclear Facilities Safety Board* means the Board established under the National Defense Authorization Act, Fiscal Year 1989.

(c) *General Counsel* means the Board's principal legal officer, or an attorney serving as Acting General Counsel.

(d) *Meeting* means the deliberations of three or more Members where such deliberations determine or result in the joint conduct or disposition of official Board business. A meeting does not include:

(1) Notation voting or similar consideration of business for the purpose of recording of votes, whether by circula-

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tion of material to the Members individually in writing or by a polling of the Members individually by telephone.

(2) Action by three or more Members to:

(i) Open or to close a meeting or to release or to withhold information pursuant to §1704.5;

(ii) Set an agenda for a proposed meeting(s);

(iii) Call a meeting on less than seven days' notice as permitted by §1704.6(b); or

(iv) Change the subject matter or the determination to open or to close a publicly announced meeting under §1704.7(b).

(3) A session attended by three or more Members for which the purpose is to have the Board's staff or expert consultants to the Board brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official Board business on such matters.

(4) A session attended by three or more Members for which the purpose is to have the Department of Energy (including its contractors) or other persons or organizations brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official Board business on such matters.

(5) A gathering of Members for the purpose of holding informal preliminary discussions or exchange of views which do not effectively predetermine official action.

(e) *Member* means an individual duly appointed and confirmed to the collegial body, known as "the Board."

§ 1704.3 Open meetings requirement.

(a) Any meetings of the Board, as defined in §1704.2, shall be conducted in accordance with this part. Except as provided in §1704.4, the Board's meetings, or portions thereof, shall be open to public observation.

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(b) The General Counsel or his designee will attend and monitor briefings described in § 1704.2(d) (3)–(4) and informal preliminary discussions described in § 1704.2(d)(5) to assure that those gatherings do not proceed to the point of becoming deliberations and “meetings” within the meaning of the Sunshine Act.

(c) The General Counsel or his designee will inform the Board Members if developing discussions at a briefing or gathering should be deferred until a notice of an open or closed meeting can be published in the FEDERAL REGISTER, and a meeting conducted pursuant to the Sunshine Act and these regulations.

§ 1704.4 Grounds on which meetings may be closed or information may be withheld.

Except in a case where the Board finds that the public interest requires otherwise, a meeting may be closed and information pertinent to such meeting otherwise required by §§ 1704.5, 1704.6, and 1704.7 to be disclosed to the public may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:

(a) Disclose matters that are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy; and

(2) In fact properly classified pursuant to such Executive order. In making the determination that this exemption applies, the Board shall rely upon the classification assigned to a document by the Department of Energy or other originating agency;

(b) Relate solely to the internal personnel rules and practices of the Board;

(c) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided*, That such statute:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

This exemption applies to Board meetings, or portions of meetings, involving

deliberations regarding recommendations which, under 42 U.S.C. 2286d (a) and (g)(3), may not be made publicly available until after they have been received by the Secretary of Energy or the President, respectively;

(d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Involve accusing any person of a crime, or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, but only to the extent that the production of such records or information would;

(1) Interfere with enforcement proceedings;

(2) Deprive a person of a right to a fair trial or an impartial adjudication;

(3) Constitute an unwarranted invasion of personal privacy;

(4) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(5) Disclose investigative techniques and procedures; or

(6) Endanger the life or physical safety of law enforcement personnel;

(h) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action of the Board, except that this subsection shall not apply in any instance where the Board has already disclosed to the public the content or nature of its proposed action, or where the Board is required by law to make such disclosure on its own initiative prior to taking final action on such proposal;

(i) Specifically concern the Board's issuance of a subpoena, or the Board's participation in a civil action or proceeding, an action in a foreign court or

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international tribunal, or an arbitration, or the initiation, conduct, or disposition by the Board of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing; or

(j) Disclose other information for which the Government in the Sunshine Act provides an exemption to the open meeting requirements of that Act.

§ 1704.5 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

(a) A majority of all Members may vote to close a meeting or withhold information pertaining to that meeting. A separate vote shall be taken with respect to any action under § 1704.4. A majority of the Board may act by taking a single vote with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular subject matters and is scheduled to be held no more than thirty days after the initial meeting in such series. Each Member's vote under this paragraph shall be recorded and proxies are not permitted.

(b) Any person whose interest may be directly affected if a portion of a meeting is open may request the Board to close that portion on any of the grounds referred to in § 1704.4 (e), (f), or (g). Requests, with reasons in support thereof, should be submitted to the General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. On motion of any Member, the Board shall determine by recorded vote whether to grant the request.

(c) Within one working day of any vote taken pursuant to this section, the Board shall make available a written copy of such vote reflecting the vote of each Member on the question, and if a portion of a meeting is to be closed to the public a full written explanation of its action closing the meeting and a list of all persons expected to attend and their affiliation.

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(d) For every closed meeting, the General Counsel of the Board shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemption provision. If the General Counsel invokes the exemption for classified or sensitive unclassified information under § 1704.4(a), he shall rely upon the classification or designation assigned to the document containing such information by the Department of Energy or other originating agency. A copy of such certification, together with a statement setting forth the time and place of the meeting and the persons present, shall be retained by the Board as part of the transcript, recording, or minutes required by § 1704.8.

§ 1704.6 Procedures for public announcement of meetings.

(a) For each meeting, the Board shall make public announcement, at least one week before the meeting, of the:

- (1) Time of the meeting;
- (2) Place of the meeting;
- (3) Subject matter of the meeting;
- (4) Whether the meeting is to be open or closed; and
- (5) The name and business telephone number of the official designated by the Board to respond to requests for information about the meeting.

(b) The one week advance notice required by paragraph (a) of this section may be reduced only if:

- (1) A majority of all Members determines by recorded vote that Board business requires that such meeting be scheduled in less than seven days; and
- (2) The public announcement required by paragraph (a) of this section is made at the earliest practicable time.

(c) Immediately following each public announcement required by this section, or by § 1704.7, the Board shall submit a notice of public announcement for publication in the FEDERAL REGISTER.

§ 1704.7 Changes following public announcement.

(a) The time or place of a meeting may be changed following the public

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announcement only if the Board publicly announces such change at the earliest practicable time. Members need not approve such change.

(b) The subject matter of a meeting or the determination of the Board to open or to close a meeting, or a portion thereof, to the public may be changed following public announcement if:

(1) A majority of all Members determines by recorded vote that Board business so requires and that no earlier announcement of the change was possible; and

(2) The Board publicly announces such change and the vote of each Member thereon at the earliest practicable time.

(c) The deletion of any subject matter announced for a meeting is not a change requiring the approval of the Board under paragraph (b) of this section.

§ 1704.8 Transcripts, recordings, or minutes of closed meetings.

Along with the General Counsel's certification and presiding officer's statement referred to in § 1704.5(d), the Board shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or a portion thereof, closed to the public. The Board may maintain a set of minutes in lieu of such transcript or recording for meetings closed pursuant to § 1704.4(i). Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote.

§ 1704.9 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

The Board shall make promptly available to the public in the Public Reading Room the transcript, electronic recording, or minutes of the discussion of any item on the agenda or of any testimony received at a closed meeting, except for such item, or items, of discussion or testimony as determined by the Board to contain matters which may be withheld under the exemptive provisions of § 1704.4. Copies

of the nonexempt portions of the transcript or minutes, or transcription of such recordings disclosing the identity of each speaker, shall be furnished to any person at the actual cost of transcription or duplication. If at some later time the Board determines that there is no further justification for withholding a portion of a transcript, electronic recording, or minutes or other item of information from the public which has previously been withheld, such portion or information shall be made publicly available. The Board shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or a portion thereof, closed to the public for at least two years after such meeting, or until one year after the conclusion of any Board proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

§ 1704.10 Severability.

If any provision of this part or the application of such provision to any person or circumstances, is held invalid, the remainder of this part or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

PART 1705—PRIVACY ACT

Sec.

- 1705.01 Scope.
- 1705.02 Definitions.
- 1705.03 Systems of records notification.
- 1705.04 Requests by persons for access to their own records.
- 1705.05 Processing of requests.
- 1705.06 Appeals from access denials.
- 1705.07 Requests for correction of records.
- 1705.08 Appeals from correction denials.
- 1705.09 Disclosure of records to third parties.
- 1705.10 Fees.
- 1705.11 Exemptions.

AUTHORITY: 5 U.S.C. 552a(f).

SOURCE: 56 FR 47144, Sept. 18, 1991, unless otherwise noted.

§ 1705.01 Scope.

This part contains the Board's regulations implementing the Privacy Act of 1974, Public Law 93-579, 5 U.S.C. 552a.

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§ 1705.02 Definitions.

The following terms used in these regulations are defined in the Privacy Act, 5 U.S.C. 552a(a): *agency, individual, maintain, record, system of records, statistical record, and routine use*. The Board's use of these terms conforms with the statutory definitions. References in this part to "the Act" refer to the Privacy Act of 1974.

§ 1705.03 Systems of records notification.

(a) *Public notice*. The Board has published in the FEDERAL REGISTER its systems of records. The Office of the Federal Register biennially compiles and publishes all systems of records maintained by all Federal agencies, including the Board.

(b) *Requests regarding record systems*. Any person who wishes to know whether a system of records contains a record pertaining to him or her may file a request in person or in writing. Written requests should be directed to: Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. Telephone requests should be made by calling the Board at 202-208-6400, and asking to speak to the Privacy Act Officer.

§ 1705.04 Requests by persons for access to their own records.

(a) *Requests in writing*. A person may request access to his or her own records in writing by addressing a letter to: Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. The request should contain the following information:

(1) Full name, address, and telephone number of requester,

(2) Proof of identification, which should be a copy of one of the following: Valid driver's license, valid passport, or other current identification which contains both an address and picture of the requester,

(3) The system of records in which the desired information is contained, and

(4) At the requester's option, authorization for copying expenses (see § 1705.10 below).

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(b) *Requests in person*. Any person may examine his or her own records on the Board's premises. To do so, the person should call the Board's offices at 202-208-6400 and ask to speak to the Privacy Act Officer. This call should be made at least two weeks prior to the time the requester would like to see the records. During this call, the requester should be prepared to provide the same information as that listed in paragraph (a) of this section, except for proof of identification.

§ 1705.05 Processing of requests.

(a) *Requests in writing*. The Privacy Act Officer will acknowledge receipt of the request within five working days of its receipt in the Board's offices. The acknowledgment will advise the requester if any additional information is needed to process the request. Within fifteen working days of receipt of the request, the Privacy Act Officer will provide the requested information or will explain to the requester why additional time is needed for response.

(b) *Requests in person*. Following the initial call from the requester, the Privacy Act Officer will determine (1) whether the records identified by the requester exist, and (2) whether they are subject to any exemption under § 1705.11 below. If the records exist and are not subject to exemption, the Privacy Act Officer will call the requester and arrange an appointment at a mutually agreeable time when the records can be examined. The requester may be accompanied by one person of his or her own choosing, and should state during this call whether or not a second individual will be present at the appointment. At the appointment, the requester will be asked to present identification as stated in § 1705.04(a)(2).

(c) *Excluded information*. If a request is received for information compiled in reasonable anticipation of litigation, the Privacy Act Officer will inform the requester that this information is not subject to release under the Privacy Act (see 5 U.S.C. 552a(d)(5)).

§ 1705.06 Appeals from access denials.

When access to records has been denied by the Privacy Act Officer, the requester may file an appeal in writing. This appeal should be directed to The

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Chairman, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., suite 700, Washington, DC 20004. The appeal letter must (a) specify those denied records which are still sought, and (b) state why the denial by the Privacy Act Officer is erroneous. The Chairman or his designee will respond to such appeals within twenty working days after the appeal letter has been received in the Board's offices. The appeal determination will explain the basis for continuing to deny access to any requested records.

§ 1705.07 Requests for correction of records.

(a) *Correction requests.* Any person is entitled to request correction of a record pertaining to him or her. This request must be made in writing and should be addressed to Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. The letter should clearly identify the corrections desired. An edited copy of the record will usually be acceptable for this purpose.

(b) *Initial response.* Receipt of a correction request will be acknowledged by the Privacy Act Officer in writing within five working days of receipt of the request. The Privacy Act Officer will endeavor to provide a letter to the requester within thirty working days stating whether or not the request for correction has been granted or denied. If the Privacy Act Officer decides to deny any portion of the correction request, the reasons for the denial will be provided to the requester.

§ 1705.08 Appeals from correction denials.

(a) When amendment of records has been denied by the Privacy Act Officer, the requester may file an appeal in writing. This appeal should be directed to The Chairman, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. The appeal letter must (1) specify the records subject to the appeal, and (2) state why the denial of amendment by the Privacy Act Officer is erroneous. The Chairman or his designee will respond to such appeals within

thirty working days (subject to extension by the Chairman for good cause) after the appeal letter has been received in the Board's offices.

(b) The appeal determination, if adverse to the requester in any respect, will: (1) Explain the basis for denying amendment of the specified records, (2) inform the requester that he or she may file a concise statement setting forth reasons for disagreeing with the Chairman's determination, and (3) inform the requester of his or her right to pursue a judicial remedy under 5 U.S.C. 552a(g)(1)(A).

§ 1705.09 Disclosure of records to third parties.

Records subject to the Privacy Act that are requested by any person other than the individual to whom they pertain will not be made available except in the following circumstances:

(a) Their release is required under the Freedom of Information Act in accordance with the Board's FOIA regulations, 10 CFR part 1703;

(b) Prior consent for disclosure is obtained in writing from the individual to whom the records pertain; or

(c) Release is authorized by 5 U.S.C. 552a(b) (1) or (3) through (11).

§ 1705.10 Fees.

A fee will not be charged for search or review of requested records, or for correction of records. When a request is made for copies of records, a copying fee will be charged at the same rate established for FOIA requests. See 10 CFR 1703.107. However, the first 100 pages of copying will be free of charge.

§ 1705.11 Exemptions.

Pursuant to 5 U.S.C. 552a(k), the Board has determined that system of records DNFSB-3, "Drug Testing Program Records," is partially exempt from 5 U.S.C. 552(a)(c)(3), (d), (e)(1), (e)(4)(G), (H), (I), and (f). The exemption pertains to portions of these records which would identify persons supplying information on drug abuse by Board employees or contractors.

PART 1706—ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTERESTS

Sec.

- 1706.1 Scope; statement of policy.
- 1706.2 Definitions.
- 1706.3 Applicability.
- 1706.4 Head of the contracting activity.
- 1706.5 General rules.
- 1706.6 Solicitation provisions.
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- 1706.8 Waiver.
- 1706.9 Examples.
- 1706.10 Remedies.
- 1706.11 Organizational conflicts of interest certificate—Advisory or assistance services.

AUTHORITY: 42 U.S.C. 2286b(c).

SOURCE: 57 FR 44652, Sept. 29, 1992, unless otherwise noted.

§ 1706.1 Scope; statement of policy.

(a) *Scope.* This part sets forth the guidelines, requirements, and procedures the Defense Nuclear Facilities Safety Board will follow in determining whether a contractor or offeror has an organizational or consultant conflict of interest (OCI) and in avoiding, neutralizing, or mitigating OCIs.

(b) *Policy.* It is the policy of the Board to identify and then avoid or mitigate organizational and consultant conflicts of interest. Normally, the Board will not award contracts to offerors who have OCIs and will terminate contracts where OCIs are identified following contract award. In exceptional circumstances, the Board reserves the right to waive conflicts of interest if it determines that such action is in the best interests of the Government, pursuant to §1706.8, and to take such mitigating measures as it deems appropriate pursuant to such section.

§ 1706.2 Definitions.

Advisory or assistance services means services acquired by contract to advise or assist the Board, whether with respect to its internal functions or its oversight of defense nuclear facilities, or otherwise to support or improve policy development or decisionmaking by the Board, or management or administration of the Board, or to support or improve the operation of the Board's

management systems. Such services may take the form of the provision of information, advice, reports, opinions, alternatives, conclusions, recommendations, training, direct assistance, or performance of site visits, technical reviews, investigation of health and safety practices or other appropriate services.

Affiliates means associated business concerns or individuals if, directly or indirectly, either one controls or can control the other or a third party controls or can control both.

Board means, as the context requires, the Defense Nuclear Facilities Safety Board, its Chairman, or any other officer of the Defense Nuclear Facilities Safety Board to whom the appropriate delegation has been made under 42 U.S.C. 2286(c)(3).

Contract means any contract, agreement, or other arrangement with the Board, except as provided in §1706.3.

Contractor means any person, firm, unincorporated association, joint venture, co-sponsor, partnership, corporation, or other entity, or any group of one or more of the foregoing, which is a party to a contract with the Board, and the affiliates and successors in interest of such party. The term “contractor” also includes the chief executive and directors of a party to a contract with the Board, the key personnel of such party identified in the contract, and current or proposed consultants or subcontractors to such party. The term “contractor” shall also include consultants engaged directly by the Board through the use of a contract.

Defense nuclear facility means any United States Department of Energy (DOE) defense nuclear facility, as defined in 42 U.S.C. 2286g, subject to the Board's oversight.

Evaluation activities means activities that involve evaluation of some aspect of defense nuclear facilities.

Mitigating means, with respect to an organizational or consultant conflict of interest, reducing or counteracting the effects of such a conflict of interest on the Board, but without eliminating or avoiding the conflict of interest.

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National Laboratories means laboratories operated by educational institutions or business entities under management and operating contracts with DOE.

Offeror means any person, firm, unincorporated association, joint venture, partnership, corporation, or other entity, or any group of one or more of the foregoing, submitting a bid or proposal to the Board, solicited, unsolicited or otherwise invited by the Board, to obtain a contract, and the affiliates and successors in interest of such a bidder or proposer. The term “offeror” also includes the chief executive and directors of such a bidder or proposer, the key personnel of a bidder or proposer identified in the bid or proposal, and proposed consultants or subcontractors to such bidder or proposer.

Organizational or consultant conflict of interest means that, because of other past, present, or future planned activities or relationships, an offeror or contractor is unable, or potentially unable, to render impartial assistance or advice to the Board, or the objectivity of such offeror or contractor in performing contract work for the Board is or might be otherwise impaired, or such offeror or contractor has or would have an unfair competitive advantage. The term “organizational or consultant conflict of interest” shall include, but not be limited to, actions or situations that would preclude the award or extension of a contract under, or would be prohibited by, § 1706.5.

Potential organizational or consultant conflict of interest means a factual situation that indicates or suggests that an actual organizational or consultant conflict of interest may exist or arise from award of a proposed contract or from continuation of an existing contract. The term is used to signify those situations that merit conflicts review prior to contract award or that must be reported to the contracting officer for conflicts review if they arise during contract performance.

Research means any scientific, engineering, or other technical work involving theoretical analysis, exploration, or experimentation.

Subcontractor means any subcontractor of any tier which performs

work under a prime contract with the Board.

Task order contract means a Board contract that contains a broad scope of work but does not authorize the contractor to perform specific tasks within that broad scope until the contracting officer issues task orders.

Unfair competitive advantage means an advantage obtained by an offeror or contractor to the Board by virtue of the relationship of the offeror or contractor with the Board or access to information not available to other offerors or contractors, and recognized in appropriate legal precedent as unfair.

In determining the meaning of any provision of this part, unless the context indicates otherwise, the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

§ 1706.3 Applicability.

(a) *General applicability.* This part applies to contractors and offerors only, except as otherwise herein provided. This part shall be incorporated by reference and made a part of all Board contracts in excess of the small purchases threshold, except as provided in the last sentence of this § 1706.3(a). In addition, if determined appropriate by the contracting officer for the Board, this part may be incorporated by reference and made a part of Board contracts below the small purchases threshold, except as provided in the last sentence of this § 1706.3(a). This part does not apply to the acquisition of services, including, without limitation, consulting services, through the personnel appointment process or to Board agreements with other federal government agencies, but shall apply to Board agreements with the management and operating contractors (and subcontractors and consultants thereto) of the National Laboratories.

(b) *Subcontractors and consultants.* The requirements of this part shall also apply to subcontractors and consultants proposed for, or working on, a Board contract, in each case where the amount of the subcontract or consultant agreement under which such subcontractor or consultant is or will be

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working is expected to exceed \$10,000, and in each other case where the contracting officer for the Board deems it appropriate to make the requirements of this part applicable to a subcontractor or consultant proposed for, or working on, a Board contract. The certificates or disclosures submitted by offerors or contractors pursuant to this part shall include certificates or disclosures from all subcontractors and consultants to contractor or offerors in those cases where this part applies by its terms to such subcontractors or consultants or has been applied to such persons by the contracting officer. Contractors and offerors shall assure that contract clauses giving effect to this § 1706.3(b), satisfactory to the contracting officer, are included in subcontracts and consultant agreements of any tier involving performance of work under a prime contract covered by this part.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

§ 1706.4 Head of the contracting activity.

The head of the contracting activity for the Board shall be the General Manager.

§ 1706.5 General rules.

(a) *Award of Contracts.* Contracts shall generally not be awarded to an offeror:

(1) For any services where the award would result in the offeror evaluating products or services it has provided to the Board, is then providing to the Board, or is then offering to provide for the Board;

(2) For evaluation activities or research related to the Board's oversight of defense nuclear facilities, where the award would result in the offeror evaluating products or services it has provided, is then providing, or is then offering to provide to DOE or to contractors or subcontractors for defense nuclear facilities; or

(3) For any other services (the acquisition of which is otherwise covered by this part), where the Board has determined, pursuant to § 1706.7, that an actual or potential OCI exists and cannot be avoided, and the Board does not waive that OCI. Paragraphs (a) (1) and

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(2) of this section also apply when award would result in evaluation of products or services of another entity where the offeror has been, is, or would be substantially involved in the development of the product or performance of the service, or has other substantial involvement regarding the product or services.

(b) *Subsequent related contracts.* (1) A Board contractor under a Board contract shall normally be ineligible to participate in Board contracts or subcontracts that stem directly from the contractor's performance of work under a previous Board contract, where the Board determines that an OCI would exist because:

(i) The expectation of receiving the subsequent contract is likely to diminish the contractor's capacity to give impartial assistance and advice, or otherwise result in a biased work product; or

(ii) An offeror on the subsequent contract would have an unfair competitive advantage by virtue of having performed the first contract.

(2) If a contractor under a Board contract prepares a complete or essentially complete statement of work or specifications in the performance of a contract, the contractor shall be ineligible to perform or participate in the initial contractual effort that is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications.

(c) *National Laboratory personnel.* The Board may engage personnel of the National Laboratories who have expertise needed by the Board in the performance of its oversight responsibilities, provided that prior to each such engagement, the Board determines either:

(1) That the nature of work performed by such personnel for DOE does not pose actual or potential OCIs with respect to the particular work covered by the Board contract; or

(2) That such engagement is in the Government's best interests and that a waiver should be granted pursuant to § 1706.8. In all cases involving National Laboratory personnel, notice of the circumstances of the contract, stating the

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rationale for use of the personnel, shall be published in the FEDERAL REGISTER.

(d) *Work for others.* During the term of any Board contract, the contractor may not enter into consulting or other contractual arrangements with other persons or entities, the result of which could give rise to an OCI with respect to the work being performed under the contract. The prime contractor shall ensure that all of its employees, sub-contractors, and consultants under the contract abide by this paragraph. If the contractor has reason to believe that any proposed arrangement with other persons or entities may involve an actual or potential OCI, it shall promptly inform the Board in writing of all pertinent facts regarding such proposed arrangement. In the case of task order contracts, this paragraph applies, subject to §1706.7(c), only to specific ongoing tasks that the contracting officer authorizes the contractor to perform.

(e) *Contractor protection of Board information that is not publicly available.* If the contractor in the performance of a Board contract obtains access to information, such as Board plans, policies, reports, studies, or financial plans, or internal data protected by the Privacy Act (5 U.S.C. 552a), proprietary information, or any other data which has not been released to the public, the contractor shall not:

(1) Use such information for any private purpose until the information has been released or is otherwise made available to the public;

(2) Compete for work for the Board based on such information for a period of six months after either the contract has been completed or such information has been released or otherwise made available to the public, whichever occurs first, or submit an unsolicited proposal to the Government based on such information until one year after such information is released or otherwise made available to the public, unless a waiver permitting such action has been granted pursuant to §1706.8; or

(3) Release the information without prior written approval of the contracting officer, unless such information has previously been released or

otherwise made available to the public by the Board.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

§ 1706.6 Solicitation provisions.

(a) *Advisory or assistance services.* There shall be included in all formal Board solicitations for advisory or assistance services where the contract amount is expected to exceed \$25,000 (or the then applicable small purchases threshold), a provision requiring a certificate representing whether award of the contract to the offeror would present actual or potential OCIs. Apparent successful offerors will be required to submit such certificates, but the Board may also require such a certificate to be submitted in other circumstances, such as:

(1) Where the contracting officer has identified certain offerors who have passed an initial screening and has determined that it is appropriate to request the identified offerors to file the certificate in order to expedite the award process; or

(2) In the case of modifications for additional effort under Board contracts, except those issued under the "changes" clause. If a certificate has been previously submitted with regard to the contract being modified, only an updating of such statement shall be required for a contract modification.

In addition, if determined appropriate by the contracting officer for the Board, such certificates may be required in connection with any other contracts subject to this part or in which this part has been incorporated by reference.

(b) *Marketing consultant services.* There shall further be included in all Board solicitations, except sealed bids, where the contract amount is expected to exceed \$200,000, a provision requiring an organizational conflicts of interest certificate from any marketing consultants engaged by an offeror in support of the preparation or submission of an offer for a Board contract by that offeror.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

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§ 1706.7 Procedures.

(a) *Pre-award disclosure and resolution of OCIs.* If a certificate under § 1706.6 indicates, or the Board otherwise learns, that actual or potential OCIs could be, or would appear to be, created by contract award to a particular offeror, the Board shall afford the affected offeror an opportunity to provide in writing all relevant facts bearing on the certificate. If the Board thereafter determines that an actual or potential OCI exists, one of the following actions shall ultimately be taken:

- (1) Disqualify the offeror;
- (2) Include in the contract appropriate terms and conditions which avoid the conflict, in which case no waiver is required; or
- (3) Make a finding that it is in the best interests of the Government to seek award of the contract under the waiver provisions of § 1706.8, and, where reasonably possible, include contract terms and conditions or take other measures which mitigate such conflicts.

(b) *Post-award disclosure and resolution of OCIs.* (1) If, after contract award, the contractor discovers actual or potential OCIs with respect to the contract, it shall make an immediate and full disclosure in writing to the contracting officer. This statement shall include a description of the action that the contractor has taken or proposes to avoid or mitigate such conflicts.

(2) If a disclosure under this section indicates, or the Board otherwise learns, that actual or potential OCIs exist, the Board may afford the contractor an opportunity to provide all relevant facts bearing upon the problem. If at any time the Board determines that an actual or potential OCI exists, one of the following actions shall ultimately be taken:

- (i) Terminate the contract, or, in the case of a task order contract, terminate the particular task;
- (ii) Insist on appropriate contract terms and conditions which avoid the OCIs, in which case no waiver is required; or
- (iii) Make a finding that it is in the best interests of the Government to permit the contractor to continue to perform the contract (or task) under

the waiver provisions of § 1706.8, and, where reasonably possible, insist on appropriate contract terms and conditions or take other measures which mitigate the OCIs.

(c) *Task order contracts.* (1) Because a task order contract generally entails a broad scope of work, apparent successful offerors shall be required to identify in their certificates filed in accordance with § 1706.6 any actual or potential OCIs that come within the full scope of the contract. The Board may decline to award a task order contract to an offeror based upon such information or it may decline to approve performance of a particular task by the contractor if an actual or potential OCI is subsequently identified with respect to that particular task. The Board may also take the other actions identified in § 1706.7(a) to avoid or mitigate such conflicts.

(2) Contractors performing task order contracts for the Board shall disclose to the contracting officer any new work for others they propose to undertake that may present an actual or potential OCI with regard to the performance of any work under the full scope of the Board contract. Such disclosure shall be made at least 15 days prior to the submission of a bid or proposal for the new work. The disclosure shall include the statement of work and any other information necessary to describe fully the proposed work and contemplated relationship.

(3) If the Board has issued a task order or a letter request for proposal under the contract with a contractor who has disclosed to the contracting officer that it proposes to undertake new work for persons other than the Board as described in § 1706.7(c)(2), for services in the same technical area and/or at the same defense nuclear facility that is the subject of the proposed new work (including overlap based upon generic work performed for others by the contractor), the Board shall inform the contractor that entering into a contract for the new work may result in termination by the Board of the task order contract, if the Board determines that such work would give rise to an OCI and the Board does not grant a waiver.

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(d) *Decisions on OCIs.* The contracting officer shall make recommendations to the General manager regarding disqualification or actions to be taken by the Board to avoid or mitigate any actual or potential OCI.

(1) The General Manager shall have the authority to approve, modify, or disapprove such recommendations regarding avoidance of an actual or potential OCI. If an offeror or contractor disagrees with the actions approved by the General Manager and requests review of the action, the Chairman shall make the decision on the actions to be taken by the Board.

(2) Any recommended action respecting the best interests of the Government and mitigation measures to be taken with respect to an actual or potential OCI must be approved by the Chairman in conjunction with the decision to grant a waiver pursuant to §1706.8, and any recommended action to terminate a contract or a particular task on account of an actual or potential OCI must be approved by the Chairman.

(3) Decisions on OCIs by the General Manager or the Chairman shall be made with the advice of the Office of the General Counsel.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

§ 1706.8 Waiver.

(a) *Waiver of OCIs.* The need for a waiver of any OCI in connection with the award or continuation of specific contracts may be identified either by the contracting officer for the Board or other Board employee or by a written request filed by an offeror or contractor with the contracting officer. The request may be combined with the certificate or disclosure required under §§1706.6 or 1706.7, or with additional statements filed under §1706.7 regarding matters raised in the certificate or disclosure. The contracting officer shall review all of the relevant facts brought to his attention and shall bring the matter to the General Manager, who shall make a written recommendation to the Chairman of the Board regarding whether a waiver should be granted for a contract award or for continuation of an existing contract.

(b) *Criteria for Waiver of OCIs.* (1) The Chairman is authorized to waive any OCI (and the corresponding provision of §1706.5 where applicable) upon a determination that awarding or extending the particular contract, or not terminating the particular contract, would be in the best interests of the Government. Issuance of a waiver shall ordinarily be limited to those situations in which:

(i) The work to be performed under contract is vital to the Board program;

(ii) The work cannot be satisfactorily performed except by a contractor or offeror whose interests give rise to a question of OCI; and

(iii) Contractual and/or technical review and supervision methods can be employed by the Board to mitigate the conflict.

(2) The Chairman is also authorized to waive any OCI (and the corresponding provision of §1706.5 where applicable), without regard to the foregoing factors, if the Chairman determines, notwithstanding the existence of the OCI, that it is in best interests of the Government to award or extend the particular contract, or not to terminate it, without compliance with §1706.8(b)(1).

(c) *Waiver of Rules or Procedures.* The Chairman is also authorized to waive any rules or procedures contained in this part upon a determination that application of the rules or procedures in a particular situation would not be in the best interests of the Government. Any request for such a waiver must be in writing and shall describe the basis for the waiver.

(d) *Office of General Counsel.* Waivers of OCIs or of any rule or procedure contained in this part shall be made after consultation with the Office of General Counsel.

(e) *Federal Register.* Except as otherwise provided in §1706.8(c), notice of each waiver granted under this section shall be published in the FEDERAL REGISTER with an explanation of the basis for the waiver. In the discretion of the Board, notices of instances of avoidance of OCIs may also be published in the FEDERAL REGISTER.

§ 1706.9 Examples.

The examples in this section illustrate situations in which questions concerning OCIs may arise. The examples are not all inclusive, but are intended to provide offerors and contractors with guidance on how this subpart will be applied.

(a) *Circumstances*—(1) *Facts*. A Board contractor for technical assistance in the review of a safety aspect of a particular defense nuclear facility proposes to use the services of an expert who also serves on an oversight committee for a contractor of other defense nuclear facilities.

(2) *Guidance*. Assuming the work of the oversight committee has no direct or indirect relationship with the work at the facility that is the subject of the Board's contract, there would not be an OCI associated with the use of this expert in the performance of the Board contract.

(b) *Circumstances*—(1) *Facts*. A Board contractor studying the potential for a chemical explosion in waste tanks at a defense nuclear facility advises the Board that it has been offered a contract with DOE to study the chemical composition of the waste in the same tanks.

(2) *Guidance*. The contractor would be advised that accepting the DOE contract would result in termination of its performance under its contract with the Board.

(c) *Circumstances*—(1) *Facts*. The Board issues a task order under an existing contract for the evaluation of the adequacy of fire protection systems at a defense nuclear facility. The contractor then advises the Board that it is considering making an offer on a solicitation by DOE to evaluate the same matter.

(2) *Guidance*. The contractor would be advised that entering into a contract with DOE on that solicitation could result in the contract with the Board being terminated.

(d) *Circumstances*—(1) *Facts*. A firm responding to a formal Board solicitation for technical assistance provides information regarding a contract it currently has with DOE. The effort under the DOE contract is for technical assistance work at DOE facilities not

subject to Board oversight and outside its jurisdiction.

(2) *Guidance*. The Board would analyze the work being performed for DOE to ensure no potential or actual conflict of interest would be created through award of the Board contract. Should the Board determine that no potential or actual conflict of interest exists, the contractor would be eligible for award. If the Board determines that a potential or actual conflict of interest would arise through a contract award, it may disqualify the firm or, if the Board determines that such action is in the best interests of the Government, the Board may waive the conflict or the rules and procedures and proceed with the award.

(e) *Circumstances*—(1) *Facts*. The Board discovers that a firm competing for a contract has a number of existing agreements with DOE in technical areas which are unrelated to the Board's oversight authority. While these contracts may not represent a potential or actual conflict of interest regarding the substance of the technical effort, their total value constitutes a significant portion of the firm's gross revenues.

(2) *Guidance*. A conflict of interest may exist due to the firm's substantial pecuniary dependence upon DOE. Consequently, the Board may question the likelihood that the contractor would provide unbiased opinions, conclusions, and work products because of this extensive financial relationship. The Board will review and consider the extent of the firm's financial dependence on DOE, the nature of the proposed Board contract, the need by the Board for the services and expertise to be provided by the firm and the availability of such services and expertise elsewhere, and whether the likelihood of the firm's providing objective technical evaluations and opinions to the Board could be influenced in view of its DOE relationship. Based on this analysis, the Board may either determine that there is no conflict and make the award, waive the conflict if one is identified and establish procedures to mitigate it where possible, or disqualify the offeror.

(f) *Circumstances*—(1) *Facts*. The Board discovers that a firm competing

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for a contract has a substantial business relationship in technical areas unrelated to the Board's oversight authority with a contractor operating a defense nuclear facility under a DOE contract. Similar to the situation described in paragraph (e) of this section, the total value of the contracts with the DOE contractor constitutes more than half of the firm's gross revenues, even though those contracts do not represent a potential or actual conflict of interest regarding any of the particular matters to be covered by the contract with the Board.

(2) *Guidance.* The firm's substantial financial and business dependence upon the DOE contractor may give rise to a conflict of interest, in that the likelihood of the firm's rendering impartial, objective assistance or advice to the Board may be impaired by its extensive financial relationship with the DOE contractor. In this situation, the Board will review and consider the nature of the proposed Board contract, the need by the Board for the services and expertise to be provided by the firm and the availability of such services and expertise elsewhere. The Board will also review and consider the extent of the firm's financial dependence on the DOE contractor and whether the firm would be impartial and objective in providing technical evaluation and opinions to the Board, especially on matters in which the DOE contractor is involved, notwithstanding the relationship with the DOE contractor. Based on this analysis, the Board may determine that there is no actual conflict of interest and make the award. Alternatively, if the Board identifies a conflict that cannot be avoided, the Board may determine to waive the conflict in the best interests of the United States, with or without the establishment of procedures to mitigate the conflict, or it may disqualify the offeror.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

§ 1706.10 Remedies.

The refusal to provide the certificate, or upon request of the contracting officer the additional written statement, required by §§ 1706.6 and 1706.7 in connection with an award shall result in

disqualification of the offeror for that award. The nondisclosure or misrepresentation of any relevant information may also result in the disqualification of the offeror for that award. If such nondisclosure or misrepresentation by an offeror or contractor is discovered or occurs after award, or in the event of breach of any of the restrictions contained in this part, the Board may terminate the contract for convenience or default, and the offeror or contractor may also be disqualified by the Board from consideration for subsequent Board contracts and be subject to such other remedial actions as provided by law or the contract.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

§ 1706.11 Organizational conflicts of interest certificate—Advisory or assistance services.

As prescribed in or permitted by § 1706.6(a), insert the following provision in Board solicitations:

ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST CERTIFICATE—ADVISORY AND ASSISTANCE SERVICES (OCT. 1990)

(a) An organizational or consultant conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) In order to comply with the Office of Federal Procurement Policy Letter 89-1, Conflict of Interest Policies Applicable to Consultants, the offeror shall provide the certificate described in paragraph (c) of this provision.

(c) The certificate must contain the following:

(1) Name of the agency and the number of the solicitation in question.

(2) The name, address, telephone number, and federal taxpayer identification number of the offeror.

(3) A description of the nature of the services rendered by or to be rendered on the instant contract.

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(4) The name, address, and telephone number of the client or clients, a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12* months preceding the date of the certification, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter as the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable.

(5) A statement that the person who signs the certificate has made inquiry and that, to the best of his or her knowledge and belief, no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory or assistance services to be provided in connection

with the instant contract, or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated in writing to the contracting officer or his or her representative; and

(6) The signature, name, employer's name, address, and telephone number of the person who signed the certificate.

(d) Persons required to certify but who fail to do so may be determined to be nonresponsible. Misrepresentation of any fact may result in suspension or debarment, as well as penalties associated with false certifications or such other provisions provided for by law or regulation.

[End of provision]

*If approved by the head of the contracting activity, this period may be increased up to 36 months.